STATE OF IOWA

DEPARTMENT OF COMMERCE

UTILITIES BOARD

IN RE: EXCHANGE OF TRANSIT TRAFFIC	DOCKET NO. SPU-00-7 TF-00-275 (DRU-00-2)

ORDER DENYING APPLICATION FOR REHEARING

(Issued May 3, 2002)

PROCEDURAL HISTORY

On May 19, 2000, Qwest Corporation (Qwest) filed a petition with the Utilities Board (Board) for a declaratory order regarding the exchange of local traffic by wireless and other local calling entities using Qwest's facilities. Qwest's petition was identified as Docket No. DRU-00-2. However, due to the complexity and number of issues presented by the petition, the Board subsequently docketed the petition as a contested case proceeding, identified as Docket No. SPU-00-7.

On November 26, 2001, Board Chairman Munns, sitting as a Presiding Officer pursuant to earlier order of the Board, issued a "Proposed Decision and Order" in this docket. As summarized in the proposed decision, this case concerns telephone traffic between a wireless customer and a wireline customer served by an independent telephone company. Currently, if the wireless customer places such a call, the wireless companies deliver the call to Qwest, which transports the traffic to Iowa Network Systems, Inc. (INS), a centralized equal access service provider. INS

then carries the call to the independent local exchange carriers (LECs) for connection to the called customer. Qwest charges the wireless companies a transit fee for carrying the traffic. INS charges a "centralized equal access" (CEA) fee to Qwest for carrying the traffic. The independent LECs assess access charges to Qwest for terminating the wireless traffic to their customers.

In the proposed decision and order, the Presiding Officer concluded that federal law defines the wireless traffic at issue as "local," so access charges do not apply. The wireless carriers could build their own networks and interconnect directly with the independent LECs on a bill-and-keep basis, pursuant to Board and Federal Communications Commission (FCC) rules. If, however, the wireless carriers want to use INS facilities for an indirect connection, they may do so, but INS is entitled to compensation for providing those services. The appropriate rate for INS's services cannot be determined on this record. If the wireless carriers want to include Qwest in the transaction, Qwest is also entitled to compensation for carrying this traffic, but it has no obligation to pay access or other terminating fees because this is local traffic. The parties were encouraged to negotiate an agreement regarding these matters under the federal Act, with Board arbitration available for any issues the parties are unable to resolve by negotiation.

On December 11, 2001, notices of appeal were filed by INS, the Rural Iowa Independent Telephone Association (RIITA), Qwest, Iowa Telecommunications Association (ITA), and Central Scott Telephone Company (Central Scott). On

December 21, 2001, the Board issued an order waiving rules 7.8(2)"c" and "d" and establishing a procedural schedule for this appeal.

Pursuant to that schedule, on January 11, 2002, responses to the notices of appeal were filed by INS, Qwest, RIITA, ITA, Central Scott, U.S. Cellular and Verizon Wireless (collectively referred to hereinafter as Verizon), Sprint Spectrum L.P. d/b/a Sprint PCS and Sprint Communications Company L.P. (Sprint), South Slope Cooperative Telephone Company, Inc. (South Slope), and AT&T Wireless Services, Inc. (AT&T Wireless).

On March 18, 2002, the Board issued an order affirming the proposed decision and order.

On April 5, 2002, ITA filed an application for rehearing, requesting reconsideration of two issues: First, the Board's discussion of the use of bill-and-keep, and second, the Board's directive that the independent LECs allow their customers to place calls to wireless customers within the same Major Trading Area (MTA) as local calls. ITA asks that the Board issue an order clarifying that its bill-and-keep rule is not applicable to interconnection negotiations between wireline and wireless service providers and withdrawing the directive that independent LECs allow their customers to dial calls to wireless customers in the same MTA as local calls.

On April 19, 2002, answers to the ITA application for rehearing were filed by Qwest, Verizon, AT&T Wireless, and Sprint. Each of these parties resists ITA's request for reconsideration of one or both of the identified issues. Their specific arguments will be summarized in the discussion of each issue, below.

ANALYSIS

Issue 1. Does the bill-and-keep rule apply to wireline-to-wireless interconnections?

A. Summary of arguments

ITA argues the Board should clarify its prior discussion of bill-and-keep and its expected role in the negotiations between the wireless carriers and the independent LECs. On the one hand, the orders require the parties to negotiate an interconnection agreement for the exchange of wireless and wireline traffic, with the resulting terms and conditions to apply to traffic exchanged from and after April 19, 1999. On the other hand, the orders also state that if the wireless service providers were to connect directly with each of the independent LECs, they would be entitled to exchange traffic with the LECs on a bill-and-keep basis pursuant to 199 IAC 38.6, at least until such time as a continuing and significant traffic imbalance has been shown.

ITA argues these two statements create irreconcilable differences between the parties at the very opening of negotiations, as the independent LECs believe the bill-and-keep rule does not apply and the wireless service providers believe they are entitled to bill-and-keep from April 19, 1999, to a date at least six months after an interconnection agreement is executed. Because it is likely that the wireless service providers originate more traffic to the independent LECs than vice versa, any future compensation arrangements are likely to result in net payments from the wireless service providers to the independent LECs. This tends to reduce the incentive for the

wireless service providers to negotiate an interconnection agreement in a timely manner, according to the ITA.

The ITA argues that the bill-and-keep rule should not apply to wireless-to-wireline interconnection agreements because chapter 38 of the Board's rules applies only to wireline local exchange carriers and is inapplicable to wireless service providers. The ITA further argues that application of bill-and-keep in these circumstances would unfairly discriminate against the independent LECs because Qwest has a Board-approved wireless interconnection tariff that applies in the absence of an interconnection agreement and allows Qwest to charge the wireless service providers for terminating wireless calls to Qwest's local exchange customers.

Verizon argues that there is no inconsistency in the Board's orders and, therefore, no need for clarification, because the discussion concerning negotiated compensation relates to the transit services provided by INS, while the discussion concerning bill-and-keep relates to exchange of traffic with the independent LECs. These entities are differently situated; INS is entitled to compensation because it has no end-user customers involved in any of these calls, so it must recover its costs from the carriers that have such customers. The independent LECs, in contrast, have end-user customers involved in every call and can recover their costs from those customers.

Verizon also argues that bill-and-keep is the only compensation system that can legally result from this record because the Board's rule requires the use of bill-

and-keep until a factual determination is made by the Board that the exchange of traffic is unbalanced.

AT&T Wireless argues that the ITA is not seeking clarification; instead, it is seeking reversal of the Board's prior decisions. AT&T Wireless finds no ambiguity and no need for clarification.

Sprint argues the Board did not intend to reward the independent LECs with retroactive compensation for calls terminated in the past. Sprint also argues that the evidence presented at hearing establishes that the wireless service providers offered a model interconnection agreement that the ITA refused to consider, establishing that it is the ITA, not the wireless service providers, that apparently lacks an incentive to negotiate. Sprint also notes that a witness for an independent LEC admitted at hearing that bill-and-keep might be acceptable, if the traffic exchange was reasonably balanced. (Tr. 1105-06.)

Finally, Qwest argues that the Qwest tariff cited by ITA applies to wireless traffic that transits Qwest's network and does not attempt to apply access charges to the exchange of traffic with a wireless service provider, as was the case with the ITA's proposed tariff. Qwest also notes that the record shows that no service is provided pursuant to the tariff, citing Tr. 648. Qwest asks that the Board disregard the ITA's claim of discrimination based on Qwest's tariff.

B. Analysis

The divergent positions of the parties make it apparent that some further discussion of this issue is appropriate. All parties need to understand that the

Board's intention is that they negotiate one or more interconnection agreements to resolve the various issues in a commercially reasonable manner. If those negotiations are unsuccessful, the Board stands ready to determine the appropriate terms and conditions for exchange of this traffic, but that determination will have to be based on a record that is focused on issues such as the appropriate rates, terms, and conditions for interconnection in these circumstances.

However, the likelihood of successful negotiations will be improved if the parties understand the Board's view of the circumstances, based upon the record made in this docket. Clearly, the Board's bill-and-keep rule is not directly applicable to the wireless-to-wireline traffic at issue; as ITA notes, the application of chapter 38 of the Board's rules is limited to wireline carriers. However, the principles behind those rules are likely to be equally appropriate in situations involving wireless service providers, to the extent the circumstances are similar. Thus, if the Board is required to decide the terms and conditions for exchange of local traffic between wireless and wireline carriers, the Board may decide to apply the same bill-and-keep principles that it adopted as a rule in chapter 38, if it appears the flow of traffic is reasonably balanced. If, however, the traffic flow is imbalanced, then the Board will set a rate applicable to exchange of the traffic, in order to fairly compensate the carriers for use of their respective networks.

In this connection, it may be appropriate to note that the record in this docket already contains evidence from a wireless service provider that the traffic between a

wireless service provider and a wireline local exchange carrier is imbalanced. At the hearing, the Sprint witness testified:

> Q. There is another section in here. It just isn't jumping out of me, where it talks about this hearing, the facility cost, and that would be a factor that was a negotiated factor at the time that says, you know, the land to mobile is this percent, the mobile to land is this percent, and that's how we will share the cost of the facility.
>
> A. In today's environment with larger LECs, the standard current ratio is about 65/35, somewhere in that range.
>
> Q. That assumes that 65 percent of the traffic is wireless to wireline and 35 percent is reversed, wireline to wireless?
>
> A. Yes.
>
> Q. For purposes of the smaller LECs that you have negotiated agreements with, what is that ratio in general?
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> A. With a lot of the smaller LECs, because we don't do direct connections where they would share in the cost of facility, that isn't in there, but I think it is safe to assume just for discussion purposes that it is probably more in the range of 75 to 25, 80/20, something like that.
>
> Q. Okay. So it is clear under any of those scenarios that the balance of traffic is not balanced 50/50, correct?
>
> A. Yes, when based on minutes of use, that's correct.

(Tr. 2298-99.) This testimony suggests there may be a significant traffic imbalance between the wireless service providers and the independent LECs. If, in any subsequent proceeding, the Board were to determine that the traffic is imbalanced even when all of the local traffic is correctly recorded as local, then it is likely the Board would set a reciprocal compensation rate. The parties should consider this likelihood when negotiating.

In summary, the Board will clarify its earlier discussion of bill-and-keep in this way: By its own terms, the bill-and-keep requirement of 199 IAC 38.6 is not directly applicable to the wireless-to-wireline traffic at issue. However, it is likely that the principles that made the bill-and-keep requirement appropriate for wireline interconnection agreements will apply with equal force to wireless-to-wireline arrangements if the traffic exchange is reasonably balanced. If the traffic is not balanced, then bill-and-keep may not be appropriate. If the traffic was significantly imbalanced in the past, then the Board recognizes the possibility that the wireless service providers may owe termination charges to the independent LECs back to April 19, 1999.

Issue 2. Should the independent LECs be required to allow their customers to dial calls to wireless customers in the same MTA as local calls?

A. Summary of arguments

ITA also requests rehearing concerning the Board's direction that the independent LECs allow their customers to dial intraMTA calls to wireless customers as local calls. ITA asserts the Board should reconsider and withdraw the directive because it involves "numerous technical and legal problems." ITA claims that local exchange carriers are limited to providing local service within their local exchange boundaries, so "it is simply not possible for them to complete 'local' calls to wireless carriers who do not have a physical presence (i.e., interconnection) within the independent LEC's local exchange." ITA complains that treating these calls as local, rather than interexchange, will eliminate originating access revenue associated with

these calls. ITA argues the directive is unlawful because the Board fails to cite any legal authority for the directive. Finally, ITA argues the directive is a taking of property without due process of law, as it requires the independent LECs to effectively extend their networks beyond their current boundaries and therefore requiring that they spend money for which they (allegedly) will not be compensated. ITA cites two Missouri cases, from 1921 and 1967, in support of this argument.

Verizon responds that the Board correctly ordered the independent LECs to treat land-to-mobile calls as local calls for purposes of dialing and routing. Verizon argues that ITA's claim of technical and economic difficulties should be rejected as lacking in credibility, in light of the fact that some ITA members already treat certain land-to-mobile calls as local, but only if they involve their affiliated wireless service provider, Iowa Wireless. The fact that the ITA members are able to do this for their affiliated entity demonstrates it is both technologically and economically feasible.

Verizon argues that the remainder of the ITA arguments are equally without merit. ITA cites to no evidence in support of its claim that there are technical difficulties associated with treating these calls as local, while the Wireless Terminating Access Agreement with Iowa Wireless is proof that it can be done. The fact that treating these intraMTA calls as local will reduce the access revenues of the independent LECs is irrelevant, in Verizon's opinion, because the traffic is local and access charges should never have applied.

As to ITA's argument of a regulatory taking, Verizon responds that this is a new argument that cannot properly be raised at this stage of the proceedings.

Verizon also argues that the independent LECs must provide their local exchange carriers with non-discriminatory access to any number that can be dialed, meaning they must offer the same local dialing option for all other wireless service providers that the LECs offer for Iowa Wireless.

AT&T Wireless argues the technical problems alleged by ITA are largely resolved by use of INS for the purpose for which it was intended, providing centralized access to other telecommunications providers. AT&T Wireless argues there is no legal problem to address because federal law is very clear that these intraMTA calls are local calls and they must be routed and billed as such.

Sprint argues the record establishes that there is no technical requirement that customers of Iowa LECs must place calls to wireless end-users using 1+ dialing. INS's own witness testified that agreements have been reached allowing the use of local, 7-digit dialing for calls from some independent LEC customers to Iowa Wireless customers, demonstrating that there is no technological barrier. (Tr. 1940-41.)

B. Analysis

The Board will not change its finding that intraMTA calls from the wireline customers of the independent LECs to the customers of the wireless service providers are local calls and should be dialed, and billed, as such. The FCC has clearly stated that those are local calls. Ultimately, the independent LECs must treat these calls as what they are, and the Board expects that they will do so within a reasonable time frame.

First, the Board rejects the ITA's assertion that there are technical barriers to treating intraMTA calls as local. The fact that multiple ITA members already do precisely that for their own affiliate, Iowa Wireless, is sufficient evidence to demonstrate there are no insurmountable technical barriers.

Second, the Board rejects ITA's argument that the Board is somehow requiring that the independent LECs provide local service outside their service territories. First, the LECs will not be offering service to any customers outside their service territories; they will only be offering their existing customers, all of whom are located within their service territory, the ability to make a local call as a local call, even though the called party may be physically located outside the LEC's exchange. As a legal matter, this is no different from extended area service, or EAS, which is statutorily-defined as a basic local telephone service, see Iowa Code § 476.96. Moreover, as a practical matter, connecting the independent LECs to other telecommunications carriers in an efficient manner is the very reason for INS's existence and the Board expects that INS will continue to carry this traffic. The real issue appears to be who is going to pay for INS's services.

As the Board described in its previous orders, the wireless service providers could build their own networks to directly connect with the independent LECs. Under those circumstances, the wireless service providers might pay the full cost of those facilities (and therefore bear the cost of the traffic in both directions) or they might negotiate with the independent LECs for a contribution toward the cost of those facilities (and therefore share the costs of at least some of that traffic). However, INS

has already built the necessary network, making it unnecessary for the wireless service providers to do so, so long as they are willing to pay INS for the use of the INS network. The parties may be able to negotiate an arrangement where the independent LECs pay part of the INS transit charges, as is apparently done in some other states, but at this time the Board cannot rule on the question of whether that is necessary or appropriate. That remains a subject for negotiation and, if necessary, arbitration.

ORDERING CLAUSE

IT IS THEREFORE ORDERED:

The application for rehearing filed by the Iowa Telecommunications Association on April 5, 2002, is denied.

UTILITIES BOARD

/s/ Diane Munns

/s/ Mark O. Lambert

ATTEST:

/s/ Judi K. Cooper
Executive Secretary

/s/ Elliott Smith

Dated at Des Moines, Iowa, this 3rd day of May, 2002.